83-575

CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, 1983

ROSE OLIVER, PHILLIP OLIVER, NANCY OLIVER, EDWARD P. OLIVER, ROSE MARIE BRENY & RALPH BRENY, Petitioners	:	
v.	:	CIVIL ACTION
LARRY J. MC CLURE, Prosecutor of the County of Bergen, State of New Jersey, Respondent	:	

On Appeal From Interlocutory Order of the Superior Court of New Jersey, Appellate Division

PETITION FOR CERTIORARI

Counsel of Record:

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KEVIN G. ROE, Esq.
On the Brief

QUESTION PRESENTED FOR REVIEW

DOES A STATE COURT, OVER PETITIONERS' OBJECTION AND CONSISTENT WITH FEDERAL CONSTITUTIONAL PRIVACY PROTECTIONS, HAVE THE POWER TO COMPEL NON-DEFENDANT THIRD PARTIES TO SUBMIT TO THE TAKING OF BLOOD AND HAIR SAMPLES IN THE ABSENCE OF PROBABLE CAUSE TO BELIEVE THAT THEY WERE INVOLVED IN WRONGDOING?

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JURISDICTIONAL STATEMENT

Petitioners invoke the jurisdiction of this Court, pursuant to Rule 12.1 of the Rules of the Supreme Court, in that they are non-defendant civil litigants against whom the State of New Jersey has moved, ancillary to a criminal prosecution, for the compelled proudction of physical exemplars from their persons. Petitioners successfully opposed this application in the trial Court, after which time the State sought leave to appeal, which leave was granted by the Superior Court of New Jersey, Appellate Division, and the Order of the trial Court denying the State's application was summarily reversed on May 23, 1983. Petitioners thereafter sought leave to appeal to the Supreme Court of New Jersey, which leave was denied on July 6, 1983.

Petitioners thereafter commenced a civil action in the United States District Court

for the District of New Jersey, on or about July 27, 1983, at which time the Hon. Dickinson R. Debevoise, J.D.C., directed the Prosecutor of the County of Bergen, State of New Jersey, to show cause why an Order should not issue preliminarily restraining and enjoining Plaintiff from obtaining the compelled production of the physical exemplars in question. On or about August 19, 1983, Judge Debevoise dissolved the previously-entered restraining Order on the grounds that Petitioners had a full and fair opportunity to litigate their claims in the State Court and that their only recourse was to take an appeal to the United States Supreme Court.

Petitioners respectfully submit that this Court has jurisdiction pursuant to the provisions of Rule 12.1 of the Rules of the Supreme Court, and that they are

civil litigants and not criminal defendants against whom the State has obtained an Order ancillary to a criminal prosecution directing that they submit to the compelled production of physical exemplars. Petitioners are non-defendant third parties who have not been charged with any wrongdoing and against whom the State has no probable cause to believe that they were otherwise involved in wrongdoing.

CONSTITUTIONAL PROVISION RELIED UPON

"THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SEIZED". U.S. Const. amend. IV.

STATEMENT OF THE CASE

On or about December 13, 1982, the Bergen County Grand Jury indicted one Edward F. Oliver, in Indictment No. S-1131-82, for a

violation of N.J.S.A. 2C:11-3, murder. Petitioners, ROSE OLIVER, PHILLIP OLIVER, NANCY OLIVER, EDWARD P. OLIVER, ROSE MARIE BRENY and RALPH BRENY, are respectively the mother, brother, former wife, son, sister and brother-in-law of defendant, Edward F. Oliver.

On or about March 4, 1983, the Prosecutor of the County of Bergen, State of New Jersey, made application to the Hon. John J. Cariddi, J.S.C., the Judge assigned to preside over the trial of defendant, Edward F. Oliver, for an Order requiring Petitioners, ROSE OLIVER, PHILLIP OLIVER, NANCY OLIVER, EDWARD P. OLIVER, ROSE MARIE BRENY and RALPH BRENY, to submit to the taking of blood and hair samples from their persons. Petitioners objected to the application of the Prosecutor on the grounds, inter alia, that they were not party defendants to the criminal prosecution

and that the State was without probable cause to believe that they were somehow involved in any wrongdoing. By letter decision dated March 8, 1983, Judge Cariddi denied the application of the Prosecutor. A motion on behalf of the State for reconsideration of this ruling was denied by the Court on April 21, 1983.

The Prosecutor for the County of Bergen thereafter moved for leave to appeal to the Superior Court of New Jersey, Appellate Division, which leave was granted, and the Order of Judge Cariddi was summarily reversed on May 23, 1983.

Petitioners thereafter moved before the Supreme Court of New Jersey for leave to appeal the judgment of the Appellate Division, which application was denied on or about July 6, 1983.

Petitioners thereafter filed a civil action in the United States District Court

for the District of New Jersey, on or about July 27, 1983. By Order dated July 27, 1983, the Hon. Dickinson R. Debevoise, J.D.C., directed that the Prosecutor of the County of Bergen, State of New Jersey, show cause before the Court on July 28, 1983, why an Order should not issue preliminarily restraining and enjoining the Plaintiff from obtaining the compelled production of the physical exemplars in question. The matter was then continued and came on for hearing before Judge Debevoise on August 19, 1983, at which time he dissolved the previously-entered restraining Order on the grounds that Petitioners had a full and fair opportunity to litigate their claims in the State Court, and that their only recourse was to petition the United States Supreme Court for review.

The Petitioners in this case are members of the immediate and extended family of

defendant, Edward F. Oliver, who, as previously noted, has been charged with the crime of murder. The application of the Bergen County Prosecutor to obtain the compelled production of the physical exemplars from their persons was made for the avowed purpose of ruling them out as possible sources of a small stain of blood found in the trunk of an automobile belonging to defendant's mother, ROSE OLIVER. The defendant has already submitted to the taking of his blood, pursuant to an Order issued by the trial Court at the same time the State moved for permission to obtain the exemplars from the non-defendant family members.

By Order dated September 30, 1983, the Hon. Mr. Justice William Brennan of this Court stayed the Order of the Superior Court of New Jersey, Appellate Division, pending receipt of opposition papers to Petitioners'

application for a stay and pending further Order of this Court.

The trial date for the criminal prosecution of murder against defendant, Edward F. Oliver, has been scheduled for January 16, 1984. Petitioners are not a party to said prosecution.

ARGUMENT

THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT PETITIONERS A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FOR THE REASON THAT THE STATE IS NOT ENTITLED TO THE COMPELLED PRODUCTION OF PHYSICAL EXEMPLARS FROM NON-DEFENDANT THIRD PARTIES IN THE ABSENCE OF PROBABLE CAUSE.

Petitioners respectfully submit to this Court, as they did to the trial Court, that while it is clear that the Fifth Amendment privilege against self incrimination does not prohibit the compelled production of physical exemplars from a defendant who has been lawfully arrested on probable cause for the

commission of an offense, Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966), it is equally clear that the compelled production of such physical exemplars in the absence of probable cause or other reasonable grounds to suspect that a particular individual from whom the exemplar is sought has committed an offense, constitutes a violation of such person's Fourth Amendment rights. Davis v. Mississippi, 394 U.S. 721 (1969). Petitioners successfully argued before the trial Court that individuals may not be compelled to give non-testimonial physical exemplars in connection with a State's criminal investigation, unless there existed, at minimum, a well-grounded suspicion that the individual is the perpetrator of a crime, as determined by a neutral and detached

ERRATA

In State v Hall, 183 N.J. Super. 224 (App. Div. 1982), that aspect of State v Schweizer, 177 N.J. Super. 82 (Law Div. 1979) concerning the Court's lack of jurisdiction over defendant referred to in pg. 10 of this petition was overruled. The proposition for which petitioners cited and relied upon in the trial court and before this court, however, was not overruled but reaffirmed by the court in State v Hall, Supra, namely, that the existence of probable cause is a prerequisite to the compelled production of physical exemplars.

magistrate. State v. Foy, 146 N.J. Super. 378 (Law Div. 1976). In support of this contention, Petitioners relied, inter alia, on the case of State v. Schweizer, 171 N.J. Super. 82 (Law Div. 1979), where the Court denied an application on the part of the State which sought an Order to compel an assault suspect to participate in a lineup. In Schweizer, the suspect had not been arrested and no charge had been brought against him. Under the circumstances, the Court upheld that it did not have jurisdiction over the defendant who the State sought to submit to the lineup, because no Complaint on probable cause or Indictment charging the individual with a particular crime had been made. Such a process was recently described in State v. Hall, 183 N.J. Super. 224 (App. Div. 1982), quite succinctly as a "fishing expedition".

In opposition to the position taken by

the Petitioners, the State relied upon a recent Appellate Division opinion of the Superior Court of New Jersey, known as In Re Morgenthau, 188 N.J. Super. 303 (App. Div. 1983). The Morgenthau case was an application where the District Attorney of the State of New York was granted permission to obtain blood samples from the wife and stepdaughter of defendant, Donald Nash, in connection with its investigation of the C.B.S. murder cases. While Petitioners acknowledge that the Morgenthau case suggests that, under certain circumstances, the taking of physical exemplars from non-defendants may be permissible, they nevertheless pointed out certain critical factual distinctions which existed between the Morgenthau case and the case sub judice. Indeed, the trial Court below found such critical distinctions to exist when the application of the Prosecutor

was initially denied. On leave to appeal, the Superior Court of New Jersey, Appellate Division, summarily reversed, without opinion, the Order of Judge Cariddi and only made a general reference to the Morgenthau case.

A careful reading of the decision in the Morgenthau case reveals that the investigation being conducted by the New York District Attorney's office was still in the accusatory stage, as the State was still attempting to identify the source of certain bloodstains found in a van allegedly used in the murder which matched neither those of the victim nor the defendant. It was not the situation, as exists in the present case, where the Court allowed the taking of blood samples in order to rule out other possible sources of blood, where all blood types found had already been identified and connected to either the victim or the defendant. Instead, there was an

unidentified source of blood which the State was attempting to identify in the course of its investigation. To the contrary, and as was made clear in the Morgenthau case, the investigation being conducted by the New York District Attorney's Office was still in the accusatory stage, where the State was still trying to determine the existence, if any, of other participants in the murder.

In the case sub judice, the blood type found in the vehicle has already been connected to that of the victim. While the State will maintain that the blood found in the car in the case sub judice has not clearly been identified as that of the decedent, it nevertheless has presented evidence whereby 91% of the general population has been excluded as possible sources of the blood in question. What the State is attempting to do in the case sub judice, is to prove a negative, by ruling

out or excluding all members of defendant's family as possible sources of the blood in question. The fact of the matter remains, however, that the compelled production of such exemplars from members of defendant's family in the absence of probable cause is prohibited. Davis v. Mississippi, Supra.

A review of the Morgenthau decision reveals that every case cited therein which authorized the taking of evidence from non-defendant third parties was still in the investigatory and/or accusatory stage at the time the authorizations were granted. In In Re Fingerprinting of M. B., 125 N.J. Super. 115 (App. Div. 1973), the taking of fingerprints from all members of the eighth grade class was done early in the investigation, which was still in the accusatory stage, and where the authorities were still trying to identify the source of fingerprints found at

a homicide scene which did not match those of the victim. In Zurcher v. Stanford Daily, 436 U.S. 547 (1978), the search warrant which authorized the search of the school newspaper office was directed at photographs which contained the identities of participants in a riot which the authorities were still trying to determine. Finally, in State v. Meighan, 173 N.J. Super. 440 (App. Div. 1980), the Court upheld a warrantless seizure of evidence from a defendant's wife who was seen leaving their residence with a large bundle immediately following defendant's arrest on suspicion of homicide. The Court upheld the search in Meighan on the theory of preventing the destruction of evidence which bore directly on a defendant's guilt in view of his wife's suspicious behavior.

The common strain of each of the cases cited in Morgenthau, wherein the search of third parties was upheld, was that the search

in question was for evidence of a crime committed by another or to establish the identities of unknown perpetrators of such crimes. In all instances, these investigations were still in the accusatory stage.

It is respectfully submitted to this Court that the instant case is well beyond the accusatory stage, as an Indictment has already been returned against defendant, Edward F. Oliver. The physical exemplars sought by the State will not tend to establish the identity of Edward F. Oliver as the perpetrator of the crime, nor do they constitute evidence of the defendant's involvement in the crime itself. Instead, this is a case which clearly and plainly comes within the rule established in the case of Davis v. Mississippi, Super., where it was clearly held that the compelled production of

physical exemplars from third parties in the absence of probable cause or reasonable grounds to suspect that the individuals had committed any offense, constitutes a violation of such person's Constitutional rights. In this connection, the State has completely failed to set forth any facts or circumstances rising to the requisite level of probable cause that the persons from whom these exemplars are sought are in any way involved in the murder for which the defendant has been accused.

It is further submitted to this Court, as was submitted to the trial Court, that the Morgenthau case is distinguishable for the all-important reason that the persons from whom the physical exemplars were sought in the Morgenthau case were given complete transactional immunity for the crime under investigation. The Petitioners in the instant

case have not been afforded or extended the same protection of transactional immunity, as was afforded in the Morgenthau case.

Petitioners respectfully submit to this Court that the ruling of the Appellate Division of the Superior Court of New Jersey is in direct contravention to both Federal and State case law concerning the compelled production of physical exemplars. This is not a case where exemplars are sought from individuals who are suspected of having done anything wrong, or against whom the authorities have probable cause to believe that they were somehow involved in any wrongdoing. It is not a case such as that which confronted the Court in Cupp v. Murphy,412 U.S. 291 (1973), where the non-consensual taking of fingernail scrapings from a suspect was upheld, where there existed probable cause to believe

that the defendant had committed the murder of his wife. Nor is this a case as existed in Schmerber v. California, 384 U.S. 757 (1966), where the non-consensual taking of blood from a suspect arrested on probable cause for driving under the influence was upheld, despite Petitioner's contention that it violated his Fourth Amendment rights. See also John L. v. District Attorney, New York County, 56 N.Y. 2d. 288; 437 N.E. 2d 265 (1982) (blood samples permitted to be taken from homicide suspect not yet arrested, but where probable cause established to believe that he had committed the murder); United States v. Crowder, 543 F. 2d. 312 (C.A.D.C. 1976); Cert. Den. 97 S. Ct. 788 (1977) (removal of a .32 slug from murder defendant's arm allowed where probable cause existed to believe that defendant was the killer and evidence of the offense

was in his forearm and no physical harm was threatened by the procedure).

Instead, this is a case in which the evil envisioned and admonished by Justice Brennan in Davis v. Mississippi, Super., has become a reality. In Davis, it was observed that:

> "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrest' or 'investigatory detentions'". 394 U.S. at 726-727.

This is a case where, in the complete and total absence of probable cause, Petitioners are being compelled to submit to the non-consensual taking of blood and hair samples from their persons. It is a case where the State has been granted the right to intrude into Petitioners' personal security and

right to be free from arbitrary interference, in violation of their Constitutional rights. Brown v. Texas, 443 U.S. 47 (1979); Pennsylvania v. Mimms, 434 U.S. 106 (1977). See also People v. Cohn, 104 Ill. App. 3d 94, 432 N.E. 2d 625 (1982), (trial Court authorizing taking of blood and hair samples from homicide suspect reversed where State had neither filed charges nor demonstrated probable cause to believe defendant to be the perpetrator of the crime); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (search of entire third grade class invalidated in absence of facts giving official reasonable and particular suspicion as a predicate for the search of a given individual); Horton v. Goose Creek Ind. School Dist., 690 F. 2d 470 (5th Cir. 1982) (use of canines to sniff the persons of students to detect contraband unconstitutional where no individualized suspicion established).

Also instructive in this regard is the case of People v. Browning, 166 Cal. Rptr., 293; 108 Cal. App. 3d 117 (1980), where a murder defendant sought to have bullets removed from the body of the victim to buttress his claim of self defense. In denying the defendant's request, the Court observed "it is our conclusion that witnesses should have, and we hold they do have, the same Fourth Amendment protection against governmental intrusions into their bodies that defendants in criminal cases have". (i.e. probable cause to believe the intrusion will reveal evidence of a crime).

Petitioners respectfully submit to this Court that the Order of the Appellate Division of the Superior Court authorizing the compelled production of blood and hair samples from their persons rises to the

level articulated by Justice Frankfurter in Rochin v. California, 342 U.S. 165 (1952) of conduct which "shocks the conscience". An exhaustive review of the case law throughout this country fails to reveal one case where the nonconsensual taking of blood and hair samples as has been permitted in the case sub judice was allowed. Indeed, this is a case where the "reasonableness" test in complying with the requirements of the Fourth Amendment compels the conclusion that the Order of the Superior Court of New Jersey, Appellate Division, must be reversed. In balancing the interests of a free society against the need for law enforcement, the conclusion is inescapable that the Court below erred in departing from a long line of legal authority which prohibited, in the absence of probable cause, the compelled production of physical exemplars from non-

defendant third parties. Arguably, taken to its logical extreme, the Order of the Appellate Division of the Superior Court of New Jersey would permit the taking of blood samples from any individual who, at any time, came into contact with the automobile in question. Of necessity, this group would have to include any and all individuals connected with the manufacturing, sale and maintenance of the vehicle. This is clearly a case in which a line has to be drawn in accordance with the legal guidelines set forth hereinabove.

Accordingly, given the absence of probable cause that Petitioners were in any way involved in wrongdoing, the Order of the Superior Court of New Jersey, Appellate Division, which authorizes the taking of blood and hair samples from the Petitioners in this case must be reversed.

CONCLUSION

For the foregoing reasons and authorities cited in support thereof, it is respectfully requested that this Court grant Petitioners a Writ for Certiorari to the Supreme Court of the United States in order that the decision of the Superior Court of New Jersey, Appellate Division, may be reviewed by this Court.

Respectfully submitted,

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KEVIN G. ROE, Esq.
An Attorney at Law of New Jersey
On the Brief

SUPREME COURT OF NEW JERSEY
M-1027 SEPTEMBER TERM 1982
M-1028

21,424

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

EDWARD OLIVER, et al,

Defendants-Movants.

O R D E R

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file motion for leave to appeal as within time is granted (M-1027); and it is further ORDERED that the motion for leave to appeal is denied (M-1028).

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 6th day of July, 1983.

FILED
SUPREME COURT
JUL 7 1983
Clerk

Stephen W. Townsend
CLERK

A TRUE COPY
Stephen Townsend
CLERK

A-4370-82T1

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4370-82T1
MOTION NO. M-4241-82
BEFORE PART D

STATE OF NEW JERSEY

VS

EDWARD F. OLIVER

FILED
APPELLATE DIVISION
JUL 6 1983
Elizabeth McLaughlin
Clerk

JUDGES: MICHELS
PRESSLER

REC'D.
APPELLATE DIVISION
JUL 6 1983
Elizabeth McLaughlin
Clerk

MOVING PAPERS FILED JUNE 24, 1983
ANSWERING PAPERS FILED JUNE 28, 1983
DATE SUBMITTED TO COURT JULY 1, 1983
DATE ARGUED
DATE DECIDED JULY 5, 1983

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/~~APPLICATION~~ FOR STAY AND FOR ORAL ARGUMENT ON THE MOTION		X	

SUPPLEMENTAL:

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

FOR THE COURT:

Herman D. Michels
HERMAN D. MICHELS P.J.A.D.

WITNESS, THE HONORABLE HERMAN D. MICHELS, PRESIDING JUDGE OF PART D, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 5th DAY OF JULY 19 83.

Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

pj

A-736-82T1

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY

DOCKET NO. AM-736-82T
MOTION NO. M-3630-82
BEFORE PART D

VS.

JUDGES: MICHELS
PRESSLER

EDWARD F. OLIVER

FILED
APPELLATE DIVISION
MAY 24 1983
Elizabeth McLaughlin
Clerk

REC'D.
APPELLATE DIVIS
MAY 24 198
Clerk

MOVING PAPERS FILED May 6, 1983
ANSWERING PAPERS FILED May 18, 1983
DATE SUBMITTED TO COURT May 20, 1983
DATE ARGUED
DATE DECIDED May 23, 1983

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION ~~PETITION~~ FOR LEAVE TO APPEAL AND FOR SUMMARY DISPOSITION UNDER R.2:11-2.	X		X

SUPPLEMENTAL:

The motion for leave to appeal is granted.

The motion for summary disposition is granted and the order of the Law Division dated May 4, 1983 denying the motion of the State to require Rose Oliver, Phillip Oliver, Nancy Oliver, Edward Paul Oliver, Rose Marie Breny and Ralph Breny to submit to the taking of blood and hair samples in a medically approved manner under the auspices of the Bergen County Prosecutor's Office is summarily reversed. See In re Morgenthau, 188 N.J.Super. 303 (App. Div. 1983).

Judge Trautwein did not participate in the decision of this motion.

I hereby certify that the foregoing is a true copy of the original on file in my office.
Elizabeth McLaughlin
Clerk

FOR THE COURT:
Herman D. Michels
HERMAN D. MICHELS, P.J.A.D.

WITNESS, THE HONORABLE HERMAN D. MICHELS, PRESIDING JUDGE OF PART D, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 23rd DAY OF MAY, 1983.

Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

AD

SUPERIOR COURT OF NEW JERSEY

JOHN J. CARIDDI
JUDGE

BERGEN COUNTY COURT HOUSE
HACKENSACK, N. J. 07601

March 8, 1983

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : BERGEN COUNTY
INDICTMENT NO. S-1131-82

STATE OF NEW JERSEY :

-v- : Letter Decision

EDWARD F. OLIVER, :

Defendant. :

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Gentlemen:

The matter before this Court is the determination of the merits of the State's motion for permission to take measurements and photograph the exterior of the premises at 31 Coger Street, Saddle Brook, New Jersey; for permission to photograph and take measurements of the interior and exterior of an automo-

bile, including its trunk, belonging to Rose Oliver; and for Court Orders requiring the defendant, Edward F. Oliver, and Rose, Philip, Nancy and Edward Paul Oliver and Rose Marie and Ralph Breny to submit to the taking of blood and hair samples. After carefully assessing the arguments of counsel in this case heard on March 4, 1983, the Court makes the following findings:

The Court grants permission for the State to enter upon the exterior of the premises at 31 Coger Street, Saddle Brook, New Jersey, for the purposes of taking photographs of the exterior of the premises and for taking measurements of the exterior of the premises and the structures thereon.

The Court grants permission for the State to photograph and take measurements of the interior of the trunk and the exterior of a 1973 blue two-door Maverick, New Jersey Registration UJB 341 belonging to Rose Oliver, defendant's mother. The State shall give Rose Oliver timely notice of the time and place of the intended investigation so that she will have the opportunity to remove any personal property which may be within the trunk.

The State has had ample opportunity to investigate the premises at 31 Coger Street, Saddle Brook, New Jersey, including the opportunity to photograph and take measurements of the exterior, since a search warrant was granted by Judge Galda on October 2, 1981. The State also had the opportunity to photograph and take measurements of the trunk and exterior of the 1973 Maverick since Rose

Oliver consented to the search of the vehicle on September 21, 1981, points raised by the defense. However, there does not appear to be any serious objection to this facet of the State's motion.

As to the State's request for a Court Order requiring the defendant, Edward Oliver, to submit to the taking of blood and hair samples, there is no question that a New Jersey court, in appropriate circumstances, may order a suspect or a defendant to submit to the taking of physical specimens such as blood and hairs. State v. Cary, 49 N.J. 343 (1967) blood samples; State v. Burke, 172 N.J. Super. 555 (App. Div. 1980) hair and saliva samples; N.J. Evidence Rule 25; Schmerber v. California, 384 U.S. 757 (1966). Identifying characteristics and the physical condition of a person represent evidence of a non-testimonial character and as such are beyond the protective scope of the Fifth Amendment privilege against self-incrimination. As the Court noted in Cary, supra, at 350, all that is required to support such an order is that there be a "likelihood that relevant evidence might be discovered" through the taking and analysis or examination of the physical specimen. Clearly, there is a strong likelihood that relevant evidence might be discovered since Edward Oliver is the person actually accused of committing the crime.

THEREFORE, THIS COURT ORDERS that the defendant, Edward

Oliver, submit to the taking of blood and hair samples at the direction of the State.

As to the State's request for a Court Order requiring Rose, Philip, Nancy and Edward Paul Oliver and Rose Marie and Ralph Breny, all relatives of the defendant, to submit to the taking of blood and hair samples, it is clear as already noted, that the Fifth Amendment . . . privilege against self-incrimination does not prohibit the compelled production of physical exemplers from an individual. However, the taking of physical exemplers, such as fingerprints, blood and hair samples, does constitute a search within the meaning of the Fourth Amendment. As the Supreme Court noted in Davis v. Mississippi, 394 U.S. 721, 22 L.Ed. 2d 676 (1969), fingerprints obtained in violation of the Fourth Amendment are subject to the Exclusionary Rule.

The Court in Davis, supra, at 681, suggested the situation which has arisen in this case but offers little guidance.

> "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest."

The Fourth Amendment is not a barrier to third party searches for evidence of a crime committed by another. Zurcher v. Standford Daily, 436 U.S. 547 (1978). The search in Zurcher,

however, was of property, not of the person. Nevertheless, the Court suggests certain standards which should be met if the search is to comply with the requirements of the Fourth Amendment. As the Zurcher Court noted supra at 537, there must be probable cause to believe that "fruits, instrumentalities or evidence of crime" is located on the premises. The State must convince a "neutral and detached magistrate" of these factors before a warrant can issue.

As already noted, the requirements of Zurcher, while helpful, are not dispositive of the present situation; since the issue involves the search of a person not accused of any wrongdoing. In such circumstances, the Court should consider what would actually be discovered by the samples. Whether the specimens would be the fruits, instrumentalities or evidence of a crime, taking into account the serious nature of the offense and the relevance and impact of the evidence on the issue of guilt. Clearly, the burden of persuasion is on the State.

The blood and hair samples in question are not the fruits or instrumentalities of crime. The persons from whom the samples are requested are not accused of any wrongdoing. While the evidence may be "relevant" within the meaning of N.J. Evidence Rule 1(2), "having any tendency in reason to prove any material fact," it will not have a sufficient impact on the issue of guilt.

The specimens requested do not directly prove defendant's guilt. Rather, they prove a negative, by excluding those who had access to and used the 1973 Maverick as the possible sources of the blood and hair samples found in the trunk.

The Court, in attempting to construct "narrowly circumscribed procedures" as called for in Davis, supra at 681, recognizes that "reasonableness" is the overriding test of compliance with the Fourth Amendment. The Court must give utmost protection to an innocent third party's right of privacy and right to be free from unreasonable intrusion of his person. Clearly, a third party search, under the present circumstances, is unreasonable.

For the foregoing reasons, the State's request for an Order requiring Rose, Philip, Nancy and Edward Paul Oliver and Rose Marie and Ralph Breny to submit to the taking of blood and hair samples is hereby denied.

IT IS FURTHER ORDERED that all pretrial discovery in this case must be completed by April 5, 1983, as consented to by counsel. The trial date, heretofore scheduled at the pretrial conference conducted on January 31, 1983, is May 16, 1983. This is a firm date, counsel having been advised of this fact several weeks ago.

Respectfully submitted,

John J. Cariddi

John J. Cariddi, J.S.C.

JJC:ml

SUPERIOR COURT OF NEW JERSEY

JOHN J. CARIDDI
JUDGE

BERGEN COUNTY COURT HOUSE
HACKENSACK, N. J. 07601

April 21, 1983

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : BERGEN COUNTY
INDICTMENT NO. S-

STATE OF NEW JERSEY :

-vs- : Letter Decision

EDWARD OLIVER, :

Defendant. :

DENNIS CALO, Assistant Prosecutor
Bergen County Prosecutor's Office
Court House
Hackensack, New Jersey 07601

FRANK P. LUCIANNA, ESQ.
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Gentlemen:

The motion before this Court is a request by the State for reconsideration of a previous ruling by this Court in which the State's application for the taking of physical exemplars from certain non-

suspect members of defendant's immediate and extended family was denied. In support of the instant application, the State relies upon the previously unreported decision of the Appellate Division dated February 9, 1983, entitled In the Matter of an Application by Robert M. Morgenthau, District Attorney, New York County, for an Order to Compel Jeannie Nash and Michelle El Gohail to Produce Hair and Blood Samples, Finger and Palm Prints, hereinafter referred to as the Nash case. The Court has learned that this opinion has since been approved for publication. The State maintains that the Nash decision is fully dispositive of the present motion, and is indeed "on all fours" with the case before this Court. As to the Nash matter, this Court has also learned that the New Jersey Supreme Court has denied certification and further that Supreme Court Justice William J. Brennan, Jr. refused to further stay a court order requiring the samples.

This Court, after repeated readings of the Nash case and in consideration of the extensive oral argument heard by this Court on March 25, 1983, finds that there are substantial distinguishing features between Nash and the case at bar.

In the Nash case, a search of defendant's van revealed a .22 caliber shell casing, numerous bloodstains, latent fingerprints, and human hair similar to the hair found in the victim's hand. Other bloodstains were also found in the van which do not match the known

blood type of either the victim or the defendant. Nash, p. 3.

In the case at bar, the blood and hair samples found in the 1973 Maverick were clearly identified as that of the victim, Deborah Bell. In the Nash case, the existence of a third party, as evidenced by the unidentified blood and finger and palm prints in the van, is clearly in issue. The State maintains that this distinction is not dispositive since the hair found in the van was similar to the hair found in the victim's hand. While this hair may belong to the defendant, it also may belong to the unidentified third party.

This third party presence is especially significant in light of the fact that at the time the Nash case occurred, the investigation was still in the accusatory stage. The New York authorities were still attempting to determine the existence of any other participants or accessories to the so-called "CBS murders." As the New York trial court noted, the indictment was pending. Nash, p. 7 (emphasis added). The case at bar is well beyond the accusatory stage. An indictment has already been returned against the defendant.

Even accepting, arguendo, the State's argument that the exemplars would be "accusatory" against Donald Nash only be excluding others as sources of the physical specimens in the van, similar to the case at bar, the cases may still be distinguished.

The Appellate Court in Nash relied on the finding of the U.S. Supreme Court in Zurcher v. Standard Daily, 436 U.S. 547, 560 (1978),

that it is constitutionally permissible to issue search warrants in connection with a prosecutor's application to obtain material evidence from third parties who are not suspects in a criminal prosecution. Nash, p. 5.

Applying the standards of Zurcher, although not articulated by the Nash court, there must be probable cause to believe that, "fruits, instrumentalities or evidence of crime" is located on the premises, or in our case, on the person. Clearly, in the Nash case, the presence of unidentified blood, finger and palm prints constitutes the fruits or evidence of crime.

In the present case, the blood and hair samples in question are not the fruits or evidence of crime. In the case at bar, the identity of all blood and hair samples is not in issue. The blood found in the trunk of the 1973 Maverick was blood Group A, the same as that of the victim, Debbie Bell. In the Nash case, it is the identification of these unidentified specimens which would be "accusatory" against Donald Nash. The case at bar fails to meet the standards of Zurcher in that there are no unidentified specimens present.

In addition, the State has the benefit of Grand Jury testimony as to the blood types of Rose Oliver, Edward Paul Oliver, Rosemary Breny and Ralph Breny. By way of summary of the Grand Jury testimony, Rose Oliver stated that her blood type was A+ (G.J.trans-

cript p. 9). Edward Paul Oliver stated that his was AB- (G.J. transcript, pgs. 119-121). Rosemary Breny stated that her blood type was A- (G.J. Transcript, pgs. 27-29) and Ralph Breny stated that his was B+ (G.J. Transcript, p. 69). In addition, with the exception of Rosemary Breny who had a miscarriage in the car two years before, neither Rose Oliver, Patricia Oliver, Philip Oliver, Edward Paul Oliver nor Ralph Breny, recall seeing any blood in the 1973 Maverick. While this testimony is not conclusive proof, it is nevertheless relevant to the purpose of the State in ruling out possible sources of the blood found in the trunk.

For the foregoing reasons, this Court finds that the Nash case is distinguishable. Therefore, the State's application for the compelled production of physical exemplars from the members of defendant's immediate and extended family is denied.

Respectfully submitted,

John J. Cariddi, J.S.C.

JJC:ml

NO. 83-575

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROSE OLIVER, PHILLIP OLIVER
NANCY OLIVER, EDWARD P. OLIVER
ROSE MARIE BRENY AND RALPH BRENY
Petitioners,

v.

LARRY J. MC CLURE
PROSECUTOR OF THE COUNTY OF BERGEN
STATE OF NEW JERSEY
Respondent.

On Writ Of Certiorari To The Appellate Division Of The Superior Court, State Of New Jersey

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LARRY J. MC CLURE
Bergen County Prosecutor
Attorney for Respondent

SUSAN W. SCIACCA
Assistant Prosecutor
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QUESTION PRESENTED FOR REVIEW

May a court order physical exemplars seized from non-defendant third parties based upon probable cause to believe that relevant evidence will be obtained?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The following proceedings of the New Jersey State courts are reproduced in the appendix to the petition for writ of certiorari: the order of the New Jersey Supreme Court denying leave to appeal; the order of the Appellate Division of Superior Court, summarily reversing the order of the Law Division and directing Petitioners to submit to the taking of physical exemplars; and two letter decisions of the Law Division of Superior Court denying the State's motion to obtain said exemplars. None of these opinions are published.

Contained in the appendix to the present brief are: an order denying a stay, entered by Associate Justice William J. Brennan, Jr. on October 4, 1983 (Appendix A); an enforcement order entered by the Law Division on November 23, 1983 (Appendix B); and an order by

the Appellate Division granting an extension of time until December 9, 1983 for compliance with the enforcement order (Appendix C).

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 6, 1983 and the petition for writ of certiorari was thereafter filed within time. Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On December 13, 1982, a Bergen County New Jersey Grand Jury indicted Edward F. Oliver for the September 7, 1981 murder of Deborah Ann Bell. The present Petitioners are all members of the defendant's immediate family. Each of these individuals, including the defendant, had access to a 1973 Ford Maverick belonging to Rose Oliver, defendant's mother. The facts which link

both the defendant and the motor vehicle to the murder of Miss Bell are crucial to an understanding of the present issue.

The murder victim's body was discovered wrapped in a green blanket with a large dark plastic garbage bag around her head. The bag and the blanket were secured with a yellow nylon rope. Subsequent investigation revealed that the yellow nylon rope matched rope used by a tree surgeon in performing work at the defendant's residence. The tree surgeon recalled seeing the defendant driving his mother's 1973 Ford Maverick and using dark plastic garbage bags to clean up debris on his property two days before the murder. A search conducted in defendant's home yielded a plastic garbage bag hidden in a hole in his closet ceiling. Laboratory analysis disclosed that this bag had been physically attached during manufacture to

the bag found over the victim's head, i.e., the two bags had been consecutively joined.

On the night of the murder victim's disappearance, neighbors had heard shrill female screams coming from the area of defendant's residence. Immediately after the screams, two neighbors saw a man and a woman in the defendant's yard. They heard a sound like a body being punched and heard the woman crying as she was being led into defendant's home.

Further investigation disclosed that the murder victim had given the defendant a substantial amount of money which he had refused to return. The defendant had stated prior to the murder that his friendship with the victim had been on "a collision course."

On the evening of the discovery of Deborah Bell's body, investigators from the Bergen County Prosecutor's Office

went to 31 Cogen Street, Saddle Brook, where the defendant resided with his mother Rose Oliver; his son, Edward Paul Oliver; and his brother and sister-in-law, Phillip and Nancy Oliver. The investigators secured consent from Rose Oliver to search her Ford Maverick. Human bloodstains were found on the trunk lid and on a raincoat contained inside the trunk, but blood grouping proved impossible. Sections of bloodstained carpeting removed from the trunk were determined to contain Type A blood, the same as the victim's. Subgrouping tests indicated that this blood type is shared by nine percent of the American public.

During the course of the search, the Maverick was vacuumed. Human hairs taken from the vacuum sweepings were compared against both the victim's hairs

and hair samples secured consensually from the defendant. The compared hairs were dissimilar.

In addition to the defendant and his mother, various other members of the Oliver family often drove the 1973 Maverick prior to the murder. Because of this, the prosecution sought to obtain blood and hair samples from all of these individuals. The State has contended throughout this litigation that the unidentified hairs will very likely be found to match those of persons who used the car innocently, and therefore would tend to prove that none other than the defendant used the car in the murder. With respect to the blood samples requested, the State has contended that the exclusion of the family members as possible sources of the blood from the trunk will bolster beyond doubt the inference that the blood was that of the

victim. Such blood analysis would require sub-typing, since at least two of the defendant's family members have testifed that they share the victim's general blood type A.

Ruling on the State's request, the trial court found that the third party search was an unreasonable intrusion on the privacy rights of innocent persons, and denied the motion. On rehearing, the court was asked to reconsider its ruling based on a newly decided case, In re Morganthau, 188 N.J. Super. 303, 457 A.2d 472 (App. Div. 1983), certif. den. 93 N.J. 315, 460 A.2d 706 (1983). Again the court denied the State's motion, ruling that the blood and hair samples found in the motor vehicle have all been identified, and that the samples sought by the State are not "evidence of crime" for which a search warrant could issue.

The State appealed this ruling to the Appellate Division, which summarily reversed based on the Morganthau case. The New Jersey Supreme Court then denied the Petitioners' motion for leave to appeal. Following an unsuccessful attempt to obtain review in the United States District Court for the District of New Jersey, the family members filed the present Petition for a Writ of Certiorari and sought a stay of the state court judgement from Justice William Brennan, Jr. After Justice Brennan denied the stay, the State obtained an enforcement order directing the family members to supply the exemplars by November 30, 1983. Said order was modified by the Appellate Division to extend the deadline to December 9, 1983. The Petitioners then applied to the New Jersey Supreme

Court for a further stay, and the State agreed not to seek enforcement pending that decision.

SUMMARY OF ARGUMENT

Third parties, wholly innocent of any criminal wrongdoing, may nonetheless be in possession of evidence sought in connection with a prosecution of another. When the evidence sought is corporeal, a court may order such individual to submit to the taking of physical exemplars based upon probable cause to believe relevant evidence will be uncovered. The court's order is the functional equivalent of a search warrant.

ARGUMENT

PHYSICAL EXEMPLARS WERE PROPERLY ORDERED FROM THE PETITIONERS IN FULL ACCORDANCE WITH THE FOURTH AMENDMENT.

Defendant Oliver's family members, the Petitioners herein, argue that physical exemplars sought as evidence in criminal cases may not be compelled from innocent third parties. They rely upon Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed. 2d 676 (1969) for the proposition that the prosecution must demonstrate probable cause to connect particular third parties to the actual commission of an offense in question before exemplars may be ordered from them. The State maintains that the family members have misconstrued the holding and import of Davis v. Mississippi. As was articulated in Zurcher v. Stanford Daily, 436 U.S. 547,

98 S.Ct. 1970, 56 L.Ed. 2d 525 (1978), upon which we rely, third party searches turn upon whether probable cause exists to believe that evidence will be found, and not whether the target of the search is also the target of the prosecution.

In the Zurcher case, the Santa Clara County District Attorney's Office obtained a warrant to search for film of a violent clash between student demonstrators and the police. The warrant was directed against the Stanford Daily, a student newspaper which had carried articles and photographs detailing the event. There was no allegation that any individual connected with the newspaper had engaged in any criminal act. Following the search, the newspaper sought declaratory and injunctive relief against the various law enforcement officers responsible for obtaining and executing the warrant.

When this controversy reached the United States Supreme Court, the issue presented was phrased thusly:

> The issue here is how the Fourth Amendment is to be construed and applied to the "third party" search, the recurring situation where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring. 436 U.S. at 553, 56 L.Ed. 2d at 534.

The Court resolved this controversy by finding that the language of the Fourth Amendment gives "no apparent basis. . . for . . . imposing the requirements for a valid arrest--probable cause to believe that the third party is implicated in the crime." 436 U.S. at 554, 56 L.Ed. 2d at 534. Instead, the probable cause standard focuses on the evidence and where it may be found. Thus, "[t]he critical element in a

reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." 436 U.S. at 556, 56 L.Ed. 2d at 535.

The underpinning for this doctrine is partially found in the simple proposition that the State's interest in uncovering evidence does not vary with the locale of the evidence. The further foundation rests on the historical separation of probable cause to arrest from probable cause to search. It is apparent that probable cause to search may require the issuance of a warrant on a complaint which does not identify any particular individual as the suspect. 436 U.S. at 555-556 and n.1, 56 L.Ed. 2d at 535-536.

Zurcher fully supports the order for third-party exemplars which the State of New Jersey seeks to enforce against the Oliver family. There is no factual dispute that these individuals all had frequent access to Rose Oliver's motor vehicle. Any one of them could be the source of the totally unidentified hairs; any one of them could have a blood subgrouping matching the stain on the trunk carpeting. The probable cause for the exemplar order is, simply, the connection of these family members to the car used in the murder, the existence of hair and blood inside this car, and the self-evident proposition that hair and blood can be shed in the ordinary course of human activity. These family members stand in the same position as the editors of the Stanford Daily in Zurcher: They

harbor evidence, and although they are not criminal suspects, neither are they supportive of the prosecution.

The only distinction between Zurcher and the present case is the nature of the evidence being sought. Quite clearly, if the State were presently seeking evidence such as the murder weapon, with probable cause to believe it was located upon the premises of an Oliver family member, Zurcher would routinely govern our application. There would be no question that the prosecution would not have to show probable cause to believe the family member was linked to the crime. For the following reasons, the State maintains that the present situation is identical analytically and must yield the identical result.

It is, of course, well settled that there is no distinction between the search for instrumentalities and fruits

of crime and the search for "mere evidence" of crime. As Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L.Ed. 2d 782 (1967) explains:

> The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus--automatically provided in the case of fruits, instrumentalities or contraband--between the item to be seized and criminal behavior. Thus, in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. 387 U.S. at 306-307, 18 L.Ed. 2d at 792.

The evidence sought by the State in the present case will, depending upon the results of laboratory analysis, explain the source(s) of the unidentified hairs and include or exclude the family members as sources of the bloodstain. It is obviously important for the State's case to be able to narrow down the source of

the blood to the murder victim, and to be able to show the jury that the hairs found in the car are innocuous. Such evidence would doubtless bolster our case against Edward Oliver.

It is true that the evidence the State seeks may point to the defendant's guilt by excluding others, rather than by directly implicating him. Such evidence remains relevant, for it continues to impact upon guilt and to prove a material fact. The use of forensic evidence in analyzing a crime scene is commonplace, both for what the laboratory results prove and disprove. Innocent third parties are routinely asked to provide corporeal samples, in aid of both the prosecution and the defense. People v. Browning, 166 Cal. Rptr. 292, 296, 108 Cal. App. 3d 117, 122-123 (Cal. App. 1980). Such evidence "includes" or "excludes" depending upon circumstances,

and proof by inclusion is acceptable. United States v. Dionisio, 410 U.S. 1, 12-13 & n. 12, 93 S.Ct. 764, 771, 35 L.Ed. 2d 67 (1973).

Despite the fact that the evidence which is being sought is corporeal, the order for its production must be considered the functional equivalent of a search warrant. The State agrees that obtaining blood and hair will involve a search of the persons of the family members and must be judged by Fourth Amendment standards. Search warrants are required to search for evidence in dwellings and are no less required when the intrusion is into the human body. Schmerber v. California, 384 U.S. 757, 766-770, 86 S.Ct. 1826, 16 L.Ed. 2d 908, 917-919 (1966) [test for alcohol in blood]; See also, Cupp v. Murphy, 412

U.S. 291, 294-296, 93 S.Ct. 2000, 2003-04, 36 L.Ed. 2d 900, 904-906 (1973) [removal of fingernail scrapings].

The family members who contest the present search do not disagree that Fourth Amendment precepts govern the obtaining of exemplars. The difference between the position of the Petitioners and the State is that the Petitioners seek the same Fourth Amendment protection accorded to an accused even though they are not suspects. That is the fundamental problem with their reliance upon Davis v. Mississippi, supra.

In Davis, following the rape of an elderly lady, the Meridian Police took at least 24 black youths to headquarters where they were subjected to questioning and fingerprinting, in the total absence of probable cause to believe they were implicated in the crime. Each of these individuals was a potential suspect only

because the assailant had been described as a young black. When the fingerprints of one of these young men was found to match prints found on the victim's windowsill, he was arrested and ultimately convicted of the crime. On appeal, the United States Supreme Court reversed, finding that the Fourth Amendment had been violated by the investigatory seizure of the defendant. The Court condemmed the "wholesale intrusions upon the personal security of our citizenry" which had subjected "unlimited numbers of innocent persons" to harassment and ignominy in violation of the Fourth Amendment. 394 U.S. at 726-727, 22 L.Ed. 2d at 680-681. On the other hand, the Court left open the possibility of permitting detention for fingerprinting "under narrowly defined

circumstances" in the absence of probable cause. 394 U.S. at 727, 22 L.Ed. 2d at 681.

Davis stands for the proposition that the police may not detain and search persons at will on the mere hope that one of them may prove to be the guilty party. Its holding pertains exclusively to those who could be suspects in an unsolved crime. It does not speak to third party searches, since every individual fingerprinted in Davis had been targeted for prosecution in the event his prints had matched those on the sill.

Research has disclosed few reported cases in which corporeal evidence was sought from non-suspect third parties. One such decision, In re Morganthau, 188 N.J. Super. 303, 457 A.2d 472 (App. Div.), certif. den. 93 N.J. 315, 460 A.2d 706 (1983) is directly on point to the present case. In Morganthau, the

Manhattan District Attorney sought blood, hair, and fingerprints from two relatives of an individual who was under indictment for four murders. These exemplars were necessary to identify various bloodstains and latent prints found in a van and a garage to which the relatives had access. The hair samples were necessary to try to match a hair found clutched in the hand of one victim. The van and the garage were crucial locales in the perpetration and concealment of the crimes: The victim found holding the hair had been abducted in the van; the van was repainted in the garage following the murders. 188 N.J. Super. at 305-307, 457 A.2d. at 473-474.

The New Jersey Appellate Division granted the exemplars sought by the Manhattan District Attorney. The Court reasoned that the State sought the "functional equivalent of a search

warrant," and that a search warrant could issue "in connection with evidence tending to show a violation of the penal laws of [New Jersey] or any other state." 188 N.J. Super. at 307, 457 A.2d at 475. Most crucial for present purposes, the court then relied upon Zurcher v. Stanford Daily for the proposition that it is constitutionally permissible to issue search warrants in connection with a prosecutor's application to obtain material evidence from third parties who are not suspects in a criminal prosecution." Id. The court concluded that, based on Zurcher, a non-culpable third party could be forced to give corporeal evidence, provided that these physical exemplars would constitute material evidence relevant to the defendant's guilt. The "minimal invasion" of the privacy interests of these individuals was outweighed by the

societal interest in an adequate prosecution. 188 N.J. Super. at 308-309, 457 A.2d at 475-476.

Morganthau makes the precise connection of legal theories urged by the State in the present matter. Given the fact that corporeal evidence may be obtained from a defendant in the Schmerber line of cases, and the further fact that third party premises may be searched pursuant to Zurcher, then it is a logically inevitable synthesis for a court to order third party physical exemplars. The simplicity of this proposition makes it evident that a grant of certiorari on the present petition is wholly unnecessary. The doctrine established by Morganthau and applied by the New Jersey courts herein is so well founded that it needs no further

scrutiny. Born of two well-established lines of cases, its lineage is impeccable.

The State urges that the petition for writ of certiorari be denied. We maintain that the court below applied well-settled principles of law and that there is no conflict or important legal issue for this Court to resolve.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be denied.

Respectfully submitted,

LARRY J. MC CLURE
Bergen County Prosecutor

BY: SUSAN W. SCIACCA
Assistant Prosecutor
Bergen County Prosecutor's Office
Court House
Hackensack, NJ 07601
Counsel of Record

APPENDIX A

SUPREME COURT OF THE UNITED STATES

NO. A-232

ROSE OLIVER, ET AL.,

Applicants,

v.

LARRY J. MC CLURE,
PROSECUTOR OF BERGEN COUNTY,
NEW JERSEY

O R D E R

UPON FURTHER CONSIDERATION of the application of counsel for the applicants and the response filed thereto,

IT IS ORDERED that the temporary

stay entered on September 30, 1983, by the undersigned is vacated, and the application for stay is denied.

/s/ William J.Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 4th
day of October, 1983

APPENDIX B

LARRY J. MC CLURE
BERGEN COUNTY PROSECUTOR
COURT HOUSE
HACKENSACK, NEW JERSEY 07601

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY-LAW DIVISION
INDICTMENT NO. S-1131-82

THE STATE OF NEW JERSEY :

-vs- :

EDWARD OLIVER, :

Defendant :

This matter having come before the Court on the request of the Bergen County Prosecutor, First Assistant Prosecutor Dennis Calo appearing; and

Rose Oliver, Edward Paul Oliver, Rosemarie Breny, Ralph Breny, Phillip Oliver and Nancy Oliver having been represented by Kevin G. Roe, Esq.;

IT IS ON THIS 23rd day of November, 1983,

ORDERED that the individuals mentioned in this Order appear at the Bergen County Jail Annex at 11 a.m. Wednesday, November 30, 1983 and at that time submit to the taking of hair and blood samples in a medically approved manner.

_____

JOHN J. CARIDDI, J.S.C.

APPENDIX C

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART G

GAULKIN
COLEMAN

THE STATE OF NEW JERSEY,

v.

EDWARD OLIVER

MOVING PAPERS FILED	NOVEMBER 29,1983
ANSWERING PAPERS FILED	NOVEMBER 29,1983
DATE SUBMITTED TO COURT	NOVEMBER 29,1983
DATE ARGUED	NOVEMBER 29,1983
DATE DECIDED	NOVEMBER 29,1983

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION FOR STAY PENDING DETERMINATION OF PETITION FOR A WRIT OF CERTIORARI		X	X

SUPPLEMENTAL: The November 23, 1983

order requiring the individuals therein named to appear at the Bergen County Jail Annex at 11 a.m. Wednesday, November 30, 1983 to submit to the taking of hair and blood samples in a medically approved manner is amended to adjourn the date and time of such appearance to Friday, December 9, 1983 at 11 a.m.

The application for stay of the November 23, 1983 order as thus amended is denied.

FOR THE COURT

GEOFFREY GAULKIN, J.A.D.

WITNESS, THE HONORABLE
JUDGE OF PART G, SUPERIOR
COURT OF NEW JERSEY,
APPELLATE DIVISION, THIS
29th DAY OF NOVEMBER, 1983.

ELIZABETH MC LAUGHLIN
Clerk of the Appellate Division